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JACK-IN PILE (M) SDN BHD v. BAUER (MALAYSIA) SDN BHD & ANOTHER APPEAL

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ
AHMAD MAAROP PCA
B AZAHAR MOHAMED FCJ
ALIZATUL KHAIR OSMAN FCJ
IDRUS HARUN FCJ
[CIVIL APPEAL NO: 02(f)-58-07-2018(B)
& 02(f)-59-07-2018(B)]
C 16 OCTOBER 2019

CONSTRUCTION LAW: *Adjudication – Proceedings – Dispute on non-payment of claims – Construction Industry Payment and Adjudication Act 2012 ('CIPAA') – Whether applied to construction contracts entered into before coming into*
D *operation of CIPAA – Parties entered into construction contract containing conditional payment clause – Applicability of s. 35 of CIPAA – Whether prohibition of conditional payment under s. 35 of CIPAA mere procedural matter – Whether parties' freedom to contract would be manifestly affected – Whether bargain entered into by parties would be frustrated – Whether CIPAA prospective*
E *or retrospective in its operation – Whether CIPAA impacted parties' substantive rights – Whether construction contract remained valid – Whether entire adjudication proceedings rendered void and ought to be set aside*

STATUTORY INTERPRETATION: *Retrospective operation – Construction of statutes – Construction Industry Payment and Adjudication Act 2012 ('CIPAA')*
F *came into force on 15 April 2014 – Disputes on non-payment of claims – Whether CIPAA applied to construction contracts entered into before coming into operation of said Act – Parties entered into construction contract containing conditional payment clause – Applicability of s. 35 of CIPAA – Whether prohibition of conditional payment under s. 35 of CIPAA mere procedural matter – Whether*
G *parties' freedom to contract manifestly affected – Whether bargain entered into by parties frustrated – Whether CIPAA prospective or retrospective in its operation – Whether CIPAA impacted parties' substantive rights – Whether construction contract remained valid – Whether Parliament intended CIPAA to have retrospective effect – Federal Constitution, art. 66 cl. (5) – Interpretation Acts 1948*
H *and 1967, ss. 2(3), 19(1), 43(a)*

The appellant in these appeals was a contractor appointed by the respondent by a letter of award dated 16 March 2011 as its subcontractor for a project ('the project'). Under cl. 11.1 of the agreement, all payments to the appellant shall only be made within seven days from the date the respondent received
I their related progress payments from the employer of this project, ITD-Vertex Consortium Sdn Bhd ('the employer'). From this clause, there was no obligation on the respondent to make payment to the appellant until and unless the respondent received payment from the employer for the related

progress payment. On 3 August 2016, the appellant issued a payment claim to the respondent pursuant to Construction Industry Payment and Adjudication Act 2012 ('CIPAA'). Payment disputes arose in respect of progress claim for the sum of RM1,053,034 which was later reduced to RM906,034 in the later part of the adjudication proceedings. The appellant contended that the said progress claim was not certified as paid by the respondent. Adjudication proceedings pursuant to the CIPAA were thus commenced by the appellant. At the conclusion of the adjudication proceedings, the adjudicator delivered his decision whereupon the respondent was required to pay the appellant the adjudicated amount. Pursuant to an originating summons filed in the High Court, the appellant sought to enforce the adjudication decision. However, the respondent in their originating summons, filed before the same High Court, sought to set aside the adjudication decision. Both applications were heard together. The High Court, in allowing the appellant's claim to enforce the adjudication decision and dismissing the respondent's setting aside application, held that cl. 11.1 of the agreement was a conditional payment clause. The CIPAA came into force on 15 April 2014 and the High Court found that cl. 11.1, being a conditional payment provision, had been rendered void by s. 35 of the CIPAA. The High Court held that the CIPAA, including s. 35, applied retrospectively. The Court of Appeal, however, found that there was no express provision in the CIPAA excluding or including construction contracts made prior to the commencement of the CIPAA. The Court of Appeal proceeded to state the trite legal position that unless there were clear words in the legislation to the contrary, any legislation affecting substantive rights must be given a prospective effect. There was no dispute that prior to the adjudication process, the appellant only received payments when the respondent had been paid by the employer. Thus, the Court of Appeal was driven to conclude that the CIPAA was prospective in nature. The appellant, in believing that the decision of the Court of Appeal was erroneous, appealed. Leave to appeal was granted by this court upon two questions of law (i) whether CIPAA applied to construction contracts entered into before the coming into operation of this Act *ie*, 15 April 2014; and (ii) if question (i) was answered in the affirmative, did it follow that s. 35 of CIPAA 2012 should also apply to construction contracts entered into before the coming into operation of this Act.

Held (dismissing appeals with costs)
Per Idrus Harun FCJ delivering the judgment of the court:

(1) The applicability of s. 35 of the CIPAA depended on whether it was intended to have a retrospective operation. From a perusal of the CIPAA, there was no express provision that Parliament had manifestly intended that the CIPAA shall operate retrospectively. The application of s. 35 of the CIPAA to the agreement would exclude and impair the respondent's express rights under the agreement which was the right to

pay the appellant only after they have received their related progress payments from the employer. The respondent had exercised their rights pursuant to cl. 11.1 and throughout the years had reiterated its reliance on the said clause of the agreement and the appellant had acquiesced to this pay when paid mode of payment. Thus, any construction that s. 35 applied to cl. 11.1 of the agreement would inflict a detriment on the respondent and have the effect of altering the construction contract in particular cl. 11.1 in the sense that an act allowed at the time of doing it was now forbidden by a new statute namely the CIPAA. For these reasons, the express term of the agreement in cl. 11.1 must prevail over any provision in the CIPAA as this was an express term of the construction contract that was agreed upon by the parties well before the CIPAA was enacted by Parliament. (paras 18, 19 & 47)

(2) The main intention of the CIPAA was to create a simple and cheaper mechanism to resolve payment disputes under a construction contract. The CIPAA has created and given a new avenue of access to justice to claimants in the construction industry. Whilst part of the reason the CIPAA was enacted was to remedy an existing problem facing the construction industry, which the law making body was aware of, Parliament is silent on whether such a remedy was to be applied retrospectively. If Parliament had intended for the CIPAA to be applied retrospectively, it would have expressly included a provision to that effect. Parliament did not though, and instead in accordance with s. 1(2) of the CIPAA, it came into operation on 15 April 2014 without express provision to the effect that the CIPAA shall come into operation on a date prior to the date on which the instrument was published which was 15 April 2014 as required under s. 43(a) of the Interpretation Acts 1948 and 1967 ('Interpretation Acts') or should apply to construction contracts entered into on or before its commencement date. It was thus apparent that Parliament had not evinced any intention that the CIPAA was to be applied retrospectively. (paras 24, 25 & 47)

(3) It is a common feature in any construction contract to have a 'pay when paid' clause which makes the obligation of the main contractor to pay a subcontractor conditional upon the main contractor having received payment from the principal. The prohibition of this conditional payment under s. 35 was not a mere procedural matter. It was a substantive right acquired pursuant to the construction contract. It manifestly affected parties' freedom to contract. The prohibition would inevitably have a significant effect on existing construction contracts and thus affected the right of parties to the construction contract since by virtue of such statutory prohibitions, the conditional payment clause could not be enforced thereby frustrating the bargain entered into by the parties. This court could not accept the simplistic approach that s. 35 of the CIPAA was declaratory in nature in that it declared that any

conditional payment provision in a construction contract as void and that such provision could operate retrospectively. Consequently, the CIPAA should be prospective and not retrospective in its operation. (para 33)

(4) In the absence of express words to such effect, a statute, notwithstanding whether it is procedural or substantive, cannot be applied retrospectively to impair a substantive right. This settled legal position accorded well with and further amplified the statutory provisions of the interpretation statute namely the Interpretation Acts. The CIPAA in itself does not contain any provision stating that it had retrospective application. Parliament therefore clearly did not exercise its legislative power pursuant to art. 66 cl. (5) of the Federal Constitution and ss. 2(3), 19(1) and 43(a) of the Interpretation Acts to enact the CIPAA with retrospective effect. (para 45)

(5) Given that the CIPAA impacts parties' substantive rights, a retrospective application of the CIPAA would have the effect of interfering with the basic principle of freedom of contract. Accordingly, the bargain entered into by the parties as manifested in cl. 11.1 of the agreement should not be ceded to s. 35 of the CIPAA. In so far as s. 35 was concerned, cl.11 of the construction contract remained afoot and valid. Sections 5, 28, 29, 30, 35, 36 and 37 impacted parties' substantive rights and for this reason it could not be said that the CIPAA was only limited to procedural or social matters. A holistic interpretation and construction ought to be given and since there were various provisions in the CIPAA that impacted parties' substantive rights, it must be that the CIPAA in its entirety should have prospective application only. Thus, both questions of law allowed by the court at the leave stage must be answered in the negative. In the upshot, the entire adjudication proceedings including the adjudication decision were rendered void and therefore ought to be set aside. (paras 47, 70 & 72)

***Bahasa Malaysia** Headnotes*

Perayu dalam rayuan-rayuan ini adalah kontraktor yang dilantik oleh responden melalui surat tawaran bertarikh 16 Mac 2011 sebagai subkontraktor untuk satu projek ('projek'). Bawah kl. 11.1 perjanjian, segala bayaran kepada perayu akan hanya dibuat dalam tempoh tujuh hari dari tarikh responden menerima bayaran kemajuan daripada majikan projek ini, ITD-Vertex Consortium Sdn Bhd ('majikan'). Dari klausa ini, tiada obligasi untuk responden membuat bayaran kepada perayu sehingga responden menerima bayaran daripada majikan untuk bayaran progres. Pada 3 Ogos 2016, perayu mengeluarkan tuntutan bayaran pada responden menurut Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP'). Pertikaian bayaran timbul berkenaan tuntutan kemajuan untuk jumlah RM1,053,034 yang kemudiannya dikurangkan menjadi RM906,034 di peringkat

terkemudian prosiding penghakiman. Perayu menghujahkan bahawa tuntutan progres tersebut tidak disahkan dibayar oleh responden. Prosiding penghakiman menurut APAIP oleh itu telah dimulakan oleh perayu. Di akhir prosiding penghakiman, adjudikator menyampaikan keputusannya dan sesudah itu responden dikehendaki membayar perayu jumlah yang dihakimi. Melalui saman pemula yang difailkan di Mahkamah Tinggi, perayu menuntut untuk menguatkuasakan keputusan penghakiman. Walau bagaimanapun, responden dalam saman pemulanya, yang difailkan di Mahkamah Tinggi yang sama, menuntut pengetepian keputusan penghakiman tersebut. Kedua-dua permohonan didengar bersama-sama. Mahkamah Tinggi, dalam membenarkan tuntutan perayu untuk menguatkuasakan keputusan penghakiman dan menolak permohonan pengetepian, memutuskan kl. 11.1 perjanjian adalah klausa pembayaran bersyarat. Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 berkuat kuasa pada 15 April 2014 dan Mahkamah Tinggi mendapati bahawa kl. 11.1, sebagai peruntukan bayaran bersyarat, menjadi tidak sah disebabkan s. 35 APAIP. Mahkamah Tinggi memutuskan APAIP termasuk s. 35 terpakai secara retrospektif. Mahkamah Rayuan, walau bagaimanapun, mendapati tiada peruntukan nyata dalam APAIP yang mengecualikan atau memasukkan kontrak pembinaan yang dibuat sebelum APAIP berkuat kuasa. Mahkamah Rayuan menyatakan kedudukan rasmi undang-undang bahawa melainkan terdapat perkataan-perkataan jelas dalam perundangan sebaliknya, apa-apa perundangan yang menjejaskan hak-hak substantif harus diberikan kesan prospektif. Tidak dipertikaikan bahawa sebelum proses penghakiman, perayu hanya menerima bayaran apabila responden dibayar oleh majikan. Oleh itu, Mahkamah Rayuan didorong untuk menyimpulkan APAIP bersifat prospektif. Perayu, yang percaya bahawa keputusan Mahkamah Rayuan adalah khilaf, merayu. Kebenaran untuk merayu diberikan oleh mahkamah ini berdasarkan dua persoalan undang-undang (i) sama ada APAIP terpakai pada kontrak pembinaan yang dimeterai sebelum Akta ini berkuat kuasa iaitu 15 April 2014; dan (ii) jika jawapan untuk persoalan (i) dijawab secara afirmatif, adakah s. 35 APAIP terpakai pada kontrak pembinaan yang dimeterai sebelum Akta ini berkuat kuasa.

Diputuskan (menolak rayuan dengan kos)
Oleh Idrus Harun HMP menyampaikan penghakiman mahkamah:

(1) Keterterapan s. 35 APAIP bergantung pada sama ada ini bertujuan mempunyai kuat kuasa retrospektif. Daripada penelitian APAIP, tiada peruntukan nyata bahawa Parlimen bercadang untuk APAIP berkuat kuasa secara retrospektif. Keterterapan s. 35 CIPAA pada perjanjian akan mengecualikan dan melemahkan hak-hak nyata responden bawah perjanjian iaitu hak untuk membayar perayu hanya selepas mereka menerima bayaran progres daripada majikan. Responden telah melaksanakan hak mereka menurut kl. 11.1 dan selama bertahun-tahun mengulangi kebergantungannya atas klausa perjanjian tersebut dan

perayu akur pada cara bayar apabila dibayar. Oleh itu, apa-apa takrifan s. 35 yang akan dipakai pada kl. 11.1 perjanjian akan mengakibatkan kerugian pada responden dan akan mempunyai kesan meminda kontrak pembinaan khususnya kl. 11.1 iaitu tindakan yang dibenarkan semasa ini dibuat, sekarang dilarang oleh satu statut baharu iaitu APAIP. Atas sebab-sebab ini, terma nyata perjanjian dalam kl. 11.1 harus mengatasi mana-mana peruntukan dalam APAIP kerana ini adalah terma nyata kontrak pembinaan yang disetujui oleh pihak-pihak sebelum APAIP digubal oleh Parlimen.

(2) Tujuan utama APAIP adalah untuk mewujudkan satu mekanisme mudah dan lebih murah untuk menyelesaikan pertikaian-pertikaian pembayaran bawah kontrak pembinaan. APAIP mencipta dan memberikan satu akses baru untuk penuntut-penuntut mendapatkan keadilan dalam industri pembinaan. Walaupun, sebahagian sebab APAIP digubal adalah untuk memberikan remedi pada masalah sedia ada dalam industri pembinaan, yang disedari oleh badan penggubal undang-undang, Parlimen senyap tentang sama ada remedi itu terpakai secara retrospektif. Jika Parlimen mempunyai niat untuk APAIP diguna pakai secara retrospektif, ia akan dengan nyata memasukkan peruntukan yang membawa kesan sebegitu. Parlimen tidak berbuat demikian, dan sebaliknya menurut s. 1(2) APAIP, ia berkuat kuasa pada 15 April 2014 tanpa peruntukan nyata yang membawa kesan bahawa APAIP akan berkuat kuasa pada tarikh sebelum tarikh instrumen itu diterbit iaitu 15 April 2014 seperti yang dikehendaki oleh s. 43(a) Akta Tafsiran 1948 dan 1967 ('Akta Tafsiran') atau diguna pakai pada kontrak pembinaan yang dimeterai pada atau sebelum tarikh permulaannya. Adalah ketara bahawa Parlimen tidak memperlihatkan apa-apa niat bahawa APAIP terpakai secara retrospektif.

(3) Adalah satu ciri biasa dalam mana-mana kontrak pembinaan untuk mempunyai klausa 'bayar apabila dibayar' yang membuat obligasi kontraktor utama membayar subkontraktor atas syarat apabila kontrak utama menerima bayaran daripada prinsipal. Larangan pembayaran bersyarat ini bawah s. 35 bukan satu hal prosedur. Ini satu hak substantif yang diperoleh selaras dengan kontrak pembinaan. Ini nyata menjejaskan kebebasan pihak berkontrak. Larangan pasti akan membawa kesan yang penting atas kontrak-kontrak pembinaan yang wujud dan oleh itu, menjejaskan hak pihak-pihak terhadap kontrak pembinaan kerana melalui larangan-larangan statutori, klausa bayaran bersyarat tidak boleh dikuatkuasakan dan ini akan menggagalkan perjanjian yang dimasuki pihak-pihak. Mahkamah ini tidak boleh menerima pendekatan mudah bahawa s. 35 APAIP bersifat perisytiharan yang mengisytiharkan apa-apa peruntukan bayaran bersyarat dalam kontrak pembinaan adalah terbatal dan peruntukan sebegitu boleh berkuat kuasa secara retrospektif. Akibatnya, APAIP harus berkuat kuasa secara prospektif dan bukan secara retrospektif.

(4) Tanpa menyatakan perkataan-perkataan nyata berkenaan kesan sebegitu, statut, meskipun sama ada secara prosedur atau substantif, tidak boleh terpakai secara retrospektif untuk melemahkan hak substantif. Kedudukan rasmi undang-undang ini bertepatan dengan dan seterusnya menekankan peruntukan-peruntukan statutori tafsiran statut iaitu Akta Tafsiran. APAIP tidak mengandungi apa-apa peruntukan yang menyatakan bahawa ia terpakai secara retrospektif. Oleh itu, Parlimen dengan jelasnya tidak melaksanakan kuasa perundangannya menurut per. 66 kl. 5 Perlembagaan Persekutuan dan ss. 2(3), 19(1) dan 43(a) Akta Tafsiran untuk menggubal APAIP dengan kesan retrospektif.

(5) Mengambil kira APAIP melemahkan hak-hak substantif pihak-pihak, pemakaian retrospektif APAIP akan memberi kesan campur tangan dengan prinsip asas kebebasan kontrak. Sewajarnya, perjanjian yang dimeterai pihak-pihak seperti yang dinyatakan dalam kl. 11.1 perjanjian tidak seharusnya terlepas pada s. 35 APAIP. Selagi berkaitan s. 35, kl. 11 kontrak pembinaan kekal dan sahih. Seksyen-seksyen 5, 28, 29, 30, 35, 36 dan 37 melemahkan hak-hak substantif pihak-pihak dan atas sebab ini tidak boleh dikatakan APAIP terhad hanya pada hal-hal prosedur atau sosial. Satu tafsiran dan konstruksi holistik harus diberi dan oleh kerana terdapat beberapa peruntukan dalam APAIP yang melemahkan hak-hak substantif pihak-pihak, secara keseluruhannya, APAIP harus hanya terpakai secara prospektif. Oleh itu, kedua-dua persoalan undang-undang yang dibenarkan oleh mahkamah pada peringkat rayuan harus dijawab secara negatif. Seluruh prosiding adjudikasi termasuk keputusan penghakiman menjadi tidak sah dan dengan itu, harus diketepikan.

Case(s) referred to:

Andrew Lee Siew Ling v. United Overseas Bank (Malaysia) Bhd [2013] 1 CLJ 24 FC ***(refd)***

Antah Schindler Sdn Bhd v. Ssangyong Engineering & Construction Co Ltd [2008] 3 CLJ 641 CA ***(refd)***

Globe Engineering Sdn Bhd v. Bina Jati Sdn Bhd [2014] 7 CLJ 1 FC ***(refd)***

L'Office Cherifien des Phosphates And Another v. Yamashita-Shinnihon Steamship Co Ltd (The Boucraa) [1994] 1 All ER 20 ***(refd)***

Mithilesh Kumari & Anor v. Prem Behari Khare 1989 AIR 1247 ***(refd)***

New India Insurance Co Ltd v. Smt Shanti Misra AIR 1976 SC 237 ***(refd)***

Secretary of State For Social Security And Another v. Tunnicliffe [1991] 2 All ER 712 ***(refd)***

Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 CLJ 491 CA ***(refd)***

Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor [2007] 5 CLJ 673 FC ***(refd)***

Tenaga Nasional Bhd v. Kamarstone Sdn Bhd [2014] 1 CLJ 207 FC ***(refd)***

UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor And Another Case [2015] 5 CLJ 527 HC ***(refd)***

Vacher & Sons Ltd v. London Society of Compositors [1913] AC 117-18 ***(refd)***

View Esteem Sdn Bhd v. Bina Puri Holdings Bhd [2019] 5 CLJ 479 FC ***(refd)***

West v. Gwynne [1911] 2 Ch 1 ***(refd)***
Westcourt Corporation Sdn Bhd lwn. Tribunal Tuntutan Pembeli Rumah [2004] 4 CLJ 203 FC ***(refd)***
Wilson v. First County Trust Ltd [2003] 4 All ER 97 ***(refd)***
Yew Bon Tew & Anor v. Kenderaan Bas Mara [1983] 1 CLJ 11; [1983] CLJ (Rep) 56 PC ***(refd)***

Legislation referred to:
Construction Industry Payment and Adjudication Act 2012, ss. 2, 3, 5, 13, 28, 29, 30, 35, 36, 37, 40, 41
Courts of Judicature Act 1964, s. 78
Federal Constitution, art. 66(5)
Interpretation Acts 1948 and 1967, ss. 2(1), (3), 17A, 19(1), 43(a)

Other source(s) referred to:
QC Thornton, *Legislative Drafting*, 4th edn, p 135

For the appellant - Lam Wai Loon, Rohan Arasoo Jeyabalah, Serene Hiew Mun Yi & Teoh Yen Yee; M/s Harold & Lam Partnership
For the respondent - Sanjay Mohan, Gobinath Karuppan & Adam Lee; M/s Sanjay Mohan

[Editor's note: For the Court of Appeal judgment, please see Bauer (Malaysia) Sdn Bhd v. Jack-In Pile (M) Sdn Bhd & Another Appeal [2018] 10 CLJ 293 (affirmed); For the High Court judgment, please see [2017] 1 LNS 1270 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Idrus Harun FCJ:

Introduction

[1] The present appeals have been brought by the appellant in light of the Court of Appeal's decision given on 22 February 2018 in which the respondent's appeals were allowed. In the appeal proceedings before the Court of Appeal, both the appellant and the respondent herein were the respondent and the appellant respectively. We heard these two appeals together given the commonality of issues in the questions of law raised herein for our determination. In simple terms, the common issue raised herein begs the question of whether the Construction Industry Payment and Adjudication Act 2012 ("the CIPAA" for short) which came into force on 15 April 2014 is to be construed as having retrospective or prospective operation. We propose to give reasons for our decision in these appeals at the same time in one judgment.

[2] One noteworthy feature of these appeals which deserve early mention is that the instant appeals were heard back-to-back with three other separate appeals involving parties who were not the parties herein. These appeals concern the same issue as highlighted above raising in consequence

arguments which are similar in almost every detail by both learned counsel for the respective parties. The appeals in question are *Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd*:

(i) Civil Appeal No: 02(f)-124-12-2018(W);

(ii) Civil Appeal No: 02(f)-125-12-2018(W); and

(iii) Civil Appeal No: 02(f)-126-12-2018(W).

We shall refer to these cases in this judgment where necessary.

[3] Before proceeding further, it is appropriate to emphasise at this stage that this judgment is delivered pursuant to s. 78 of the Courts of Judicature Act 1964 due to the retirement of Richard Malanjum CJ (as His Lordship then was). This is therefore a decision of the remaining members of the panel which is reached unanimously.

Questions Of Law For Determination

[4] The leave to appeal was granted by this court upon two questions of law. These questions are identical in both appeals. The first question of law for determination in respect of both appeals as allowed by this court is couched in the following terms:

> (i) Whether Construction Industry Payment and Adjudication Act 2012 (CIPAA 2012) applies to construction contracts entered into before the coming into operation of this Act i.e. 15.4.2014.

The second question of law, a corollary to the first question reads as follows:

> (ii) If the answer to question (i) above is answered in the affirmative, does it follow that Section 35 of CIPAA 2012 should also apply to construction contracts entered into before the coming into operation of this Act i.e. 15.4.2014.

We lay down below in summary the facts relevant to these two appeals.

Summary Of The Material Facts

[5] The appellant in both appeals is a contractor appointed by the respondent by a letter of award dated 16 March 2011 as its subcontractor for a project known as "Cadangan Membina 3 Blok 39 Tingkat 689 Unit Rumah Pangsa Kos Tinggi dan 23 Unit Kedai 2 Tingkat yang mengandungi Kemudahan Tadika, Dewan Serbaguna, Surau Serta 4 Tingkat Podium Tempat Letak Kereta & Rekreasi dengan 1 Tingkat Basement di atas Lot P.T.39011, HS(D) 61423, Jalan Aman Fasa 111 (Kg Berembang), Mukim Ulu Klang, Daerah Gombak, Selangor Darul Ehsan - Sub-Contract for the Supply & Installation of Spun Piles" for a contract sum of RM1,850,000 (the agreement). Under cl. 11.1 of the agreement, all payments to the appellant shall only be made within seven days from the date the respondent

received their related progress payments from the employer of this project namely ITD-Vertex Consortium Sdn Bhd (the employer). The respondent as early as March 2011 had exercised its rights pursuant to cl. 11.1 of the agreement. In fact, throughout the years 2012 and 2013 the respondent reiterated its reliance on cl. 11.1 of the agreement. From this clause, there is no obligation on the respondent to make payment to the appellant until and unless the respondent has received payment from the employer for the related progress payment.

[6] On 3 August 2016, the appellant issued a payment claim to the respondent pursuant to the CIPAA. Payment disputes arose in respect of progress claim number 8 for the sum of RM1,053,034 which was later reduced to RM906,034 in the later part of the adjudication proceedings. The appellant contended that the said progress claim was not certified as paid by the respondent. Adjudication proceedings pursuant to the CIPAA were thus commenced by the appellant. At the conclusion of the adjudication proceedings, the adjudicator delivered his decision on 23 November 2016 whereupon the respondent was required to pay the appellant the adjudicated amount of RM906,034.

[7] Pursuant to an Originating Summons No: BA-24C-34-12-2016 filed in the High Court at Shah Alam, the appellant sought to enforce the adjudication decision. However the respondent, in their Originating Summons No: BA-24C-10-02-2017 filed before the same High Court, sought to set aside the adjudication decision. Both applications were heard together. On 30 May 2017, the High Court allowed the appellant's claim to enforce the adjudication decision and dismissed the respondent's setting aside application. Dissatisfied with the said High Court's decision, the respondent filed two notices of appeal in the Court of Appeal against both the High Court's decision. On 22 February 2018, the Court of Appeal allowed both appeals. Hence, the appellant filed these two appeals to this court.

The Decision Of The High Court

[8] The issue before the High Court was whether s. 35 of the CIPAA applied. The said section provides that any conditional payment provision in a construction contract in relation to payment is void and it is a conditional payment provision when the obligation of one party to make payment is conditional upon that party having received payment from a third party. The High Court held that cl. 11.1 of the agreement is a conditional payment clause as payment from the respondent to the appellant is conditioned on the respondent having received payment from the employer. The CIPAA came into force on 15 April 2014. The High Court found that cl. 11 being a conditional payment provision had been rendered void by s. 35 of the CIPAA. Relying on the High Court decision in *UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor And Another Case* [2015] 5 CLJ 527;

[2015] 11 MLJ 499, the High Court held that the CIPAA including s. 35 applied retrospectively. The obvious implication arising out of the decision is that the CIPAA applies to all construction contracts or disputes notwithstanding whether the construction contracts were made or the disputes arose before or after the enforcement date of the CIPAA.

The Decision Of The Court Of Appeal

[9] As was before the High Court, the argument at the core of the appeals are posited on a narrow and crucial issue of the applicability of s. 35 of the CIPAA *vis-a-vis* cl. 11.1 of the agreement raising in consequence the question of whether the CIPAA takes effects retrospectively or prospectively. The Court of Appeal in the judgment of David Wong Dak Wah JCA (as His Lordship then was) having said that the applicability of s. 35 depended on whether the CIPAA was intended to have a retrospective operation, found that there was no express provision in the CIPAA excluding or including construction contracts made prior to the commencement of the CIPAA. His Lordship then proceeded to state the trite legal position that unless there were clear words in the legislation to the contrary, any legislation affecting substantive rights must be given a prospective effect. Similarly, if the legislation was procedural in nature, that legislation must be given a retrospective effect unless clear words in the same showed to the contrary. Access to justice, according to the Court of Appeal, is a substantive right. The CIPAA has created and given a new avenue of access to justice to claimants in the construction industry. Hence, the CIPAA is in essence a legislation relating to a substantive right. Within the CIPAA, the Court of Appeal recognised that there also existed a procedural regime dictating as to how claims were to be processed before the adjudicator. The procedural regime the said court opined, was nothing but a by-product or the consequence of the substantive right created by the CIPAA.

[10] The Court of Appeal accordingly held that s. 35 related to a substantive right of an individual. That substantive right is nothing less than the right to freedom of contract where parties are entitled to regulate their business affairs. Section 35 takes away the right of the parties to have their payment regime regulated by a 'pay-when-paid' mode. There was no dispute that prior to the adjudication process, the appellant only received payments when the respondent had been paid by the employer. For the above reasons, the Court of Appeal was driven to conclude that the CIPAA was prospective in nature. The Court of Appeal also took a different view to the rationale expressed by the High Court in *UDA Holdings Bhd*, *supra*.

Decision

[11] The whole of these appeals turn upon a pure question of law. The central issue of the matter brings into focus the true interpretation of the CIPAA which is whether it is to have retrospective or prospective application. At the centre of the dispute which triggers these questions of law

is s. 35 of the CIPAA which prohibits any conditional payment provisions in construction contracts whereas cl. 11.1 of the agreement allows all payments shall be made by the respondent to the appellant within seven days from the date the respondent received their related progress payments from the employer. At the core of the appellant's reasoning is their belief that the decision of the Court of Appeal is erroneous. They present their firm contention that principally the CIPAA applies retrospectively as decided by the High Court in *UDA Holdings Bhd* the decision of which was affirmed by the Court of Appeal on 13 July 2015. Learned counsel gives his reasons in support of this argument which in brief are as follows:

(i) the provisions of ss. 2, 3, 40 and 41 of the CIPAA, read together, clearly indicate that the CIPAA is intended to apply retrospectively;

(ii) learned counsel for the respondent also refers to foreign statutory adjudication legislation laying stress to the fact that Malaysia is the latest to have implemented the statutory adjudication legislation after:

(a) the Housing Grants, Construction and Regeneration Act 1996 (United Kingdom);

(b) the Building and Construction Industry Security of Payment Act 1999 (New South Wales);

(c) the Construction Contracts Act 2002 (New Zealand); and

(d) the Building and Construction Industry Security of Payment Act 2005 (Singapore).

These foreign adjudication statutes, learned counsel submits have express provisions that they only apply to contracts entered into on or after the commencement date of these statutes. However, there is no such express provision in the CIPAA 2012 which excludes the application of the CIPAA to existing or prior contracts. It is therefore clear that Parliament has intended the CIPAA to be applied retrospectively;

(iii) the entire intent and purpose of the CIPAA is to create a new mechanism or forum for the employers, main contractors, subcontractors and construction consultants to resolve their payment disputes in a quick and cheap manner, compared to arbitration and court litigation. In this way, monies properly due by virtue of works done and services rendered are not unreasonably held back by protracted and expensive litigation or arbitration. It is established law that procedural and adjectival legislation is presumed to be applied retrospectively (*Westcourt Corporation Sdn Bhd lwn. Tribunal Tuntutan Pembeli Rumah* [2004] 4 CLJ 203);

(iv) purposive interpretation ought to be given to the CIPAA in accordance with s. 17A of the Interpretation Acts 1948 and 1967 [Act 388]; and

(v) the decision of *UDA Holdings Bhd* was referred to by the Federal Court in *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2019] 5 CLJ 479; [2018] 2 MLJ 22 wherein, learned counsel submits, the Federal Court unanimously held that the previous disputes which had been referred to litigation prior to the commencement of the CIPAA covered the payment dispute arising from the same construction contract which was referred to it after the commencement date. By this, it is clear from the decision of the Federal Court that it had accepted that the CIPAA applied retrospectively.

[12] On the facts of the present case, it is an incontrovertible fact that the agreement dated 16 March 2011 in cl. 11.1 provides the respondent with a right to pay the appellant all payments within seven days from the date they received their related progress payment from the employer and that the CIPAA came into force on 15 April 2014. In accordance with the bargain entered into between the parties, the respondent now seeks to enforce the pay-when-paid provision, a right which they have acquired by virtue of cl. 11.1 of the agreement. Clause 11.1 is central to the issue for our determination. It stipulates as follows:

> 11.0. Progress Payment
>
> 11.1. **All payments shall be made within 7 days from the date the Specialist Contractor received their related progress payment** and subjected to 5% retention. The subcontractor shall submit his claims with measurement records of work done including demarcated sketches and/or delivery orders (where applicable), duly endorsed by the Specialist/Main Contractor's and Consultant's authorised site staff. The cut-off date for the progress claim shall be on 20th day of each calendar month.
>
> (emphasis added)

[13] The disagreement which results from opposing arguments raises a question as to the true interpretation of the CIPAA which is whether the CIPAA is a statute of general application or confined in its operation only to construction contracts made after the commencement of the CIPAA. The appellant adopts the position that the CIPAA is intended to apply retrospectively. In our view, the respondent clearly advances an argument of substance when it is submitted on their behalf that the CIPAA is prospective in its operation. This argument undoubtedly emerges from cl. 11.1 in question. Clause 11.1 which provides rights for the pay-when-paid mode of payment for the related progress claim in light of correct legal principles that are to be applied to a case like the present appeals, in our view, concerns with substantive rights, which right the parties have acquired pursuant to the agreement. Such acquired existing right under the agreement existed before the CIPAA came into force on 15 April 2014. Section 35 of the CIPAA which takes away the substantive rights of parties cannot be applied retrospectively, absent a clear legislative intention of the same therein. The trite general principle is that an Act of Parliament is not intended to have a

retrospective operation unless a contrary intention is evinced in express and unmistakable terms or in a language which is such that it plainly requires such a construction. Another principle of statutory interpretation which applies with equal force is that legislation to regulate human conduct ought to deal with future acts and ought not to change the character of past transactions carried on upon the faith of the existing law (*QC Thornton: Legislative Drafting*, 4th edn, p. 135).

[14] There is at common law a *prima facie* rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used, or unless a contrary intention appears (*Yew Bon Tew & Anor v. Kenderaan Bas Mara* [1983] 1 CLJ 11; [1983] CLJ (Rep) 56; *Tenaga Nasional Bhd v. Kamarstone Sdn Bhd* [2014] 1 CLJ 207; [2014] 2 MLJ 749). In other words, there is, so to speak, a presumption that legislation speaks only as to the future (*West v. Gwynne* [1911] 2 Ch 1).

[15] As a necessary reminder, lest we forget, in construing a statute, it is also relevant to consider our own interpretation statute namely Act 388 in particular sub-s. 19(1) which provides:

> 19. (1) The commencement of an Act or subsidiary legislation **shall be the date provided in or under the Act** or subsidiary legislation **or, where no date is so provided, the date immediately following the date of its publication** in pursuance of section 18. (emphasis added)

[16] The requirement of the aforesaid provisions is further made clear and reinforced by sub-s. 43(a) of Act 388 which states in peremptory terms that:

> 43. A power to appoint a date on which a written law shall come into operation **does not include power to appoint**:
>
> (a) **a date prior to the date on which the instrument of appointment is published**; or
>
> (b) different dates for different provisions of that law,
>
> **unless express provision is made in that behalf**. (emphasis added)

In addition to these provisions, sub-ss. 2(1) and (3) of Act 388 are also equally relevant. It is provided as follows:

> 2. (1) Subject to this section, Part I of this Act shall apply for the interpretation of and otherwise in relation to:
>
> (a) this Act and all Acts of Parliament enacted after 18 May 1967;
>
> -
>
> -
>
> -
>
> (3) PART I shall not apply where there is:
>
> (a) express provision to the contrary;

[17] It is pertinent to note that both sub-ss. 19(1) and 43(a) of Act 388 are found in PART I thereof. The sections without any doubt apply to the CIPAA as firstly it is a post-1967 piece of legislation and secondly, the CIPAA does not contain any express provision contrary to Part I of Act 388 so far as it relates to the issue of its retrospective or prospective operation. In this regard, Parliament is the sole authority which is vested with the legislative power to enact a law with retrospective effect. Such power is manifested expressly with clarity of language in art. 66 cl. (5) of the Federal Constitution which provides:

> (5) A Bill becomes law on being assented to by the Yang di-Pertuan Agong ... but no law shall come into force until it has been published, without prejudice however, to the Power of Parliament ... **to make laws with retrospective effect**. (emphasis added)

[18] The provisions of Act 388 referred to above are indeed a manifestation of the common law position which is statutorily embodied in the said Act. The combined effect of the above provisions plainly shows that Act 388 applies to all Acts of Parliament enacted after 18 May 1967 for the purpose of their interpretation. Accordingly, the interpretation of the CIPAA is governed by Act 388. As a general rule, a date of commencement of an Act, including the CIPAA, with retroactive operation is not allowed unless it is clearly intended by Parliament and such intention is evinced in the Act by express provisions in that behalf. It is particularly noteworthy and relevant that, from a perusal of the CIPAA, we cannot find an express provision from which we can safely say or infer that, Parliament has manifestly intended that the CIPAA shall operate retrospectively. That being the position, the application of s. 35 of the CIPAA to the agreement in the present circumstances would exclude and impair the respondent's express rights under the agreement which is the right to pay the appellant only after they have received their related progress payments from the employer.

[19] As previously indicated, the respondent as early as March 2011 had exercised their rights pursuant to cl. 11.1 in question. Throughout the years 2012 and 2013, the respondent reiterated its reliance on cl. 11.1 of the agreement and the appellant had acquiesced to this pay-when-paid mode of payment. From this clause, there is no obligation on the respondent to make payment to the appellant until and unless the respondent has received payment from the employer for the related progress payments. Thus, any construction that s. 35 applies to cl. 11.1 of the agreement would inflict a detriment on the respondent and have the effect of altering the construction contract in particular cl. 11.1 in the sense that an act allowed at the time of doing it is now forbidden by a new statute namely the CIPAA. For these reasons, the express term of the agreement in cl. 11.1 must prevail over any provision in the CIPAA as this is an express term of the construction contract that was agreed upon by the parties well before the CIPAA was enacted by Parliament.

[20] If we need to look at the principle of law on this point, the Federal Court's decision in *Kamarstone Sdn Bhd*, *supra*, clearly sums up the above proposition at pp. 216 & 217 (CLJ); pp. 755-756 (MLJ) in language that certainly merits our special mention:

> [5] ... Still, we could take this opportunity to uphold that **it is indeed a rule of construction that a statute should not be interpreted retrospectively to impair an existing right or obligation, unless such a result is unavoidable by reason of the language used in the statute** (*Yew Bon Tew & Anor v. Kenderaan Bas Mara* [1983] 1 MLJ 1 per Lord Brightman, delivering the advice of the Board).
>
> [6] In *National Land Finance Co-Operative Society Ltd v. Director General of Inland Revenue* [1994] 1 MLJ 99, Gunn Chit Tuan CJ (Malaya) said:
>
> On the retrospective operation of Acts, the presumption is that an enactment is not intended to have a retrospective operation unless a contrary intention appears. In this case, that presumption has been rebutted because s. 1(5) of the Amendment Act states in clear terms that the amendment was intended to be retrospective. But a retrospective operation should not be given to a statute to impair an existing right and it has been stated by the UK Court of Appeal in *EWP Ltd v. Moore* [1992] 1 All ER 880 at p 891:
>
> > ... that those who have arranged their affairs, as the saying is, in reliance on a decision of these courts which has stood for many years should not find that their plans have been retrospectively upset ...
>
> Moreover, one should avoid a construction that inflicts a detriment and as Lord Brightman has said in *Yew Bon Tew v. Kenderaan Bas Mara* [1983] 1 MLJ 1 at p 2:
>
> > A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability, in regard to events already past.
>
> [7] If it takes away a substantive right, the amendment will not have retrospective effect, save by clear and express words. If it is procedural, retrospectivity applies unless otherwise stated in the statute concerned (*MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673 per Steve Shim CJ (Sabah & Sarawak). **If the legislature intends an amendment to have retrospective application, it must expressly and clearly say so** (see *Puncakdana Sdn Bhd v. Tribunal for Housebuyers Claims and another application* [2003] 4 MLJ 9 per Md Raus J, as he then was).
>
> (emphasis added)

[21] Now we must turn to the case which the appellant and the learned judge of the High Court principally rely upon to support their position that the CIPAA operates retrospectively. This is the case of *UDA Holdings Bhd*, *supra*. We would mention that what has emerged from the submission of the appellant's counsel is that their position as summarised in the salient points

of his argument earlier in our judgment relies to a large extent on the decision in *UDA Holdings Bhd*. What comes sharply into focus is the High Court's decision there at p. 576 that the CIPAA was retrospective in effect. This is also the position taken by the High Court in the instant appeals. On the contrary, the Court of Appeal in these appeals arrived at the conclusion that as the right to pursue a claim in adjudication is a substantial right which was not available to the parties before the CIPAA came into force, the Act should have prospective application.

[22] In coming to its decision, the High Court in *UDA Holdings Bhd*, in a comprehensive *albeit* lengthy judgment, had commendably considered several provisions and the objective of the CIPAA and reviewed a catenation of relevant authorities to show that the CIPAA was retrospective in its operation. However, the High Court had failed to and did not appear to appreciate fully the statutory provisions of Act 388 and the common law position that absent clear and express words to such effect, the CIPAA cannot be applied retrospectively. It is necessary to note that the Court of Appeal in dismissing the appeal in *UDA Holdings Bhd* did not provide grounds of judgment for its decision.

[23] By way of emphasis, we would say with respect that there are errors in the High Court's interpretation of the CIPAA in *UDA Holdings Bhd*. To highlight such errors we would start off by giving our focus on Parliament's intention in enacting the CIPAA. The High Court's findings in *UDA Holdings Bhd* on this point can be summarised as follows:

(i) the CIPAA was enacted to ease cash flow problems in the construction industry by facilitating regular and timely payment, providing speedy payment dispute resolution through adjudication which is also about payment or to provide remedies for the recovery of payment in the construction;

(ii) the objective of CIPAA was to offer a simple, fast and cheap mechanism for resolving payment problems and payment disputes faced in the construction industry as opposed to the existing dispute resolution through arbitration or the courts; and

(iii) the CIPAA was intended to remedy an existing problem in the construction industry.

[24] From the above, the third finding made by the High Court in examining Parliament's intention that the CIPAA was intended to remedy an existing problem is important. This problem relates to the problem over payments experienced by the construction industry which is either there is non-payment, late payment or insufficient payment. Learned counsel for the appellant referred to para. [92] of parliamentary debates in Hansard of Parliament in support of his submission that the main intention of the CIPAA was to create a simple and cheaper mechanism to resolve payment disputes under a construction contract. In fact, the High Court in *UDA Holdings Bhd*

deliberated at length over the parliamentary debates on the Construction Industry Payment and Adjudication Bill when it referred to paras. [92], [95], [98] and [100] of the said Hansard of Parliament. The fact that Hansard of Parliament referred to by the High Court in *UDA Holdings Bhd* contains the said revelation on the existing problem over payments experienced by the construction industry in the Deputy Minister's speech at the second reading of the Bill to introduce the CIPAA both at Dewan Rakyat and Dewan Negara, clearly highlights that Parliament was already aware of the problem facing the construction industry. Notwithstanding the same, we find that Parliament in its wisdom elected, and in fact or did not find it necessary to insert a provision that the CIPAA was to be applied retrospectively in order to cover these existing problems in the industry.

[25] Thus, in the absence of any such provision, it is apparent that Parliament has not evinced any intention that the CIPAA is to be applied retrospectively. Whilst part of the reason the CIPAA is enacted is to remedy an existing problem, which the law making body is aware of, Parliament is silent on whether such a remedy was to be applied retrospectively. If Parliament has intended for the CIPAA to be applied retrospectively, given its full awareness of the existing problem, it would have expressly included a provision to that effect. Parliament does not though, and instead in accordance with sub-s. 1(2) of the CIPAA, it came into operation on 15 April 2014 without express provision to the effect that the CIPAA shall come into operation on a date prior to the date on which the instrument of appointment is published which is 15 April 2014 as required under sub-s. 43(a) of Act 388 or shall apply to construction contracts entered into on or before its commencement date.

[26] Notwithstanding the above, the High Court in *UDA Holdings Sdn Bhd* had inexplicably concluded that it was the undoubted intention of Parliament that the CIPAA was to be applied retrospectively and that it applied to all construction contracts regardless of the dates those construction contracts were made as well as the payment disputes that arose under those construction contracts. In our judgment, the reasons we have discussed above expose the fallacy and demonstrate the relative weakness of the cogency of the finding made by the High Court in *UDA Holdings Bhd* as well as the argument urged on behalf of the appellant. Neither the CIPAA nor Hansard of Parliament expressly provides that it is to be applied retrospectively. We accept that the intention of Parliament is to provide a speedy resolution to payment disputes in the construction industry. However, such intention without more does not in any way lead to the conclusion that Parliament has intended for the CIPAA to be applied retrospectively.

[27] The High Court in *UDA Holdings Bhd* also considered similar statutory adjudication regimes in other jurisdiction such as:

A (i) the Housing Grants, Construction and Regeneration Act 1996 (United Kingdom);

(ii) the Construction Contracts Act 2002 (New Zealand);

(iii) the Building and Construction Industry Security of Payment Act 2008 (Singapore);
B

(iv) the Building and Construction Industry Security of Payment Act 1994 (New South Wales);

(v) the Building and Construction Industry Security of Payments Act 2004 (Queensland);
C

(vi) the Construction Contracts Act 2004 (Western Australia); and

(vii) the Construction Contracts (Security of Payments) Act 2004 (Northern Territory of Australia).

D It is certainly worthy of note that these relevant statutes apply only to construction contracts which are entered into on or after the commencement of these Acts. For the appellant, learned counsel refers to the relevant foreign statutes in (i), (ii), (iii) and (iv) above and his reasoning assumes, as we understand it, that since these statutes provide for their application to construction contracts entered into after the same came into force and the
E CIPAA does not have such provisions, Parliament therefore has intended the CIPAA to be applied retrospectively.

[28] We find no difficulty in accepting that the High Court in *UDA Holdings Bhd* correctly noted that in other jurisdictions, the statutory adjudication
F regimes specifically stated that it was to be applied to construction contracts made after these Acts had come into force. However, the conclusion reached by the High Court in para. [149] and the submission of the appellant's counsel on this point involved with respect, a fallacious reasoning in which such conclusion had undoubtedly been assumed from the above argument which was not supported by clear evidence. The fact that Parliament could
G have inserted similar provisions on the applicability of the CIPAA but has chosen not to do so, does not, in itself lead to the unavoidable interpretation that the CIPAA operates retrospectively. Furthermore, such conclusion by the High Court is essentially circular. One may similarly argue that if Parliament has intended the CIPAA to be applied retrospectively,
H Parliament could have inserted such a provision. Such provision however is conspicuously absent from the CIPAA.

[29] This argument, moreover, cannot be upheld for the simple reason that the commencement point of the CIPAA is 15 April 2014 which is prescribed by the Minister in accordance with sub-s. 1(2) thereof and sub-s. 19(1) of Act
I 388. Learned counsel does not seem to realise that by virtue of sub-s. 19(1) and sub-s. 43(a) of Act 388, the commencement date of operation of the CIPAA shall be the date provided in or under the CIPAA and that a power

to appoint a date on which the CIPAA shall come into operation does not include the power to appoint a date prior to the date on which the instrument of appointment is published unless express provision is made in that behalf. Therefore, the CIPAA is not silent as to its commencement date as such, in accordance with the trite rules of interpretation, absent an express provision to the contrary, it is plain that Parliament has intended that statutory adjudication under the CIPAA should apply prospectively. The ministerial prescription as aforementioned clearly shows that the prospective operation of the CIPAA began on 15 April 2014. It necessarily follows that any construction contract entered into before the commencement of the CIPAA and any payment dispute arising out of such construction contracts are not governed by the CIPAA. Needless to say, it is not for the courts to infer Parliament's intention when, upon scrutiny of the wording of the CIPAA to glean legislative intention therefrom, no such intention is evidenced.

[30] The High Court in *UDA Holdings Bhd* also found that the CIPAA was intended to provide an alternative forum to supplement the existing court and arbitration processes. In fact, this is also the stance adopted by the appellant in their submission when they stressed that this was another reason for retrospective application of the CIPAA. The High Court in *UDA Holdings Bhd* treated adjudication offered on a statutory framework in the CIPAA as an additional alternative to existing payment dispute resolution forums such as the court and arbitration specially and specifically for the construction industry (see paras. [136], [160], [161] and [170] of the judgment). The High Court there held that the change in law was merely a change of forum and such a change of law operates retrospectively as such legislation was in character, in truth and substance procedural and adjectival legislation. The choice of forum was a matter of procedure and not a substantive right. The CIPAA, the High Court said was essentially the choice of forum citing the Federal Court decision in *Westcourt Corporation*, *supra*, which held that the establishment of Homebuyer Claim Tribunal was a creation of another forum and that the choice of forum is a matter of procedure and not a matter of substantive right and as such the Housing Developers (Control and Licensing) (Amendment) Act 2002 which provided for a change of forum from the court to tribunal operated retrospectively.

[31] The argument of the appellant on the application of *Westcourt Corporation* by the High Court in *UDA Holdings Bhd* is clearly misconceived and distinguishable. *Westcourt Corporation* was concerned with the Tribunal for Homebuyer Claims set up under the Housing Development (Control and Licensing) (Amendment) Act 2002 which amended the Housing Development (Control and Licensing) Act 1966. The amendment of the Act in question was merely concerned with a change of forum. Accordingly, the Federal Court found that the amendment of the Housing Development (Control and Licensing) Act 1966 was merely procedural and did not concern the substantive rights of parties. On this basis, the Federal Court held that the amendment therein was retrospective in nature.

[32] The CIPAA is not merely about a change of forum. It is entirely a new piece of legislation. This is acknowledged by the High Court in *UDA Holdings Bhd* itself when it rightly pointed out at para. [193] that "over and above all the other considerations discussed, CIPAA is entirely new legislation". There can be no doubt that the introduction of the CIPAA gives parties a third option or avenue for parties to take legal action, which is to refer their dispute to adjudication. Before the CIPAA was enacted, in the event there was a dispute, the parties to a construction contract had two options open to them which are to litigate or arbitrate. The CIPAA is not a plain manifestation of a change of forum only neither is it merely procedural in nature. There are provisions in the CIPAA which affect the substantive rights of parties. To illustrate our point, s. 35 of the CIPAA is one clear example of provision which deals with substantive rights and it in fact prohibits any conditional payment arrangements or provisions in construction contracts. As correctly noted by the High Court in *UDA Holdings Bhd* in para. [86], s. 35 prohibits any conditional payment provisions in construction contracts and such provisions are void.

[33] It is a common feature in any construction contract to have a 'pay-when-paid' clause which makes the obligation of the main contractor to pay a subcontractor conditional upon the main contractor having received payment from the principal. What needs to be emphasised for the purpose of our deliberation on the issue of the change of forum is that, the prohibition of this conditional payment under s. 35 is not a mere procedural matter. It is certainly a substantive right acquired pursuant to the construction contract. It manifestly affects parties' freedom to contract. Under the statutory adjudication regime, a clause on conditional payments in the construction contract will not be applicable. Accordingly, if the CIPAA is held to be retrospective in its operation, there is, we would say, more than just a grain of truth to the respondent's contention that the prohibition will inevitably have a significant effect on existing construction contracts and thus affect the right of parties to the construction contract since by virtue of such statutory prohibitions, the conditional payment clause cannot be enforced thereby frustrating the bargain entered into by the parties. We cannot in this regard accept the simplistic approach adopted by the High Court in *UDA Holdings Bhd* that s. 35 of the CIPAA is declaratory in nature in that it declares that any conditional payment provision in a construction contract as void and that such provision can operate retrospectively.

[34] Likewise s. 5 of the CIPAA which allows a single construction contract as opposed to multiple construction contracts, parties who have agreed to cross-contract set-offs pursuant to such multiple construction contracts entered into by them are now prohibited from relying on such express term by virtue of s. 5 of the CIPAA. In the three appeals which we have highlighted earlier in para. [2] of this judgment, namely

Ireka Engineering & Construction Sdn Bhd, *supra*, this court was called upon to consider whether the CIPAA applied to the construction contract in particular cl. 13.1 therein which allowed the appellant to rely on cross-contract set-offs which parties had agreed pursuant to multiple construction contracts. Section 5 as it stands now surely will have a significant impact on the cross-contract set-offs provisions in the construction contracts existing before the CIPAA was enacted. Both the High Court and the Court of Appeal there decided that they were only able to make determination on a single construction contract and that they were not empowered to decide on multiple construction contracts. Such statutory provision and decisions clearly affect the substantive rights of the parties if the CIPAA is construed to have retrospective operation.

[35] Furthermore, the implication which follows where an adjudication decision has been made is that the said decision can be enforced in accordance with PART IV of the CIPAA such as ss. 13 and 28 to 30 which will inevitably have a profound impact on and adversely affect the right of parties and the construction industry. Under s. 13, the adjudication decision is binding. Section 28 allows an adjudication decision to be enforced as if it is a judgment of the High Court whereas s. 29 allows a party to suspend performance or reduce the rate of progress of performance of any construction work or construction consultancy services of any construction contract where adjudicated amount has not been wholly paid or has been partly paid. Section 30 on the other hand allows a subcontractor such as the appellant to seek direct payment from the principal of the party against whom any adjudication decision is made and who has failed to make payment of the adjudicated amount. Although ss. 28 to 30 relate to remedies and provisions post issuance of an adjudication decision, they are triggered or activated as a consequence of the enforcement of the CIPAA retrospectively which affects the substantive rights of the respondent.

[36] Besides, we agree with the Court of Appeal in the instant case that with the advent of the CIPAA, the claimants now have an additional avenue, a new regime or an additional alternative access to existing payment dispute resolution forums to claim for their contractual fees. This new avenue of access to justice is in anyone's view a substantive right. At para. [29] of the judgment, the Court of Appeal was fully aware that within the CIPAA there also exists a procedural regime dictating as to how claims are to be processed before the adjudicator. The procedural regime created by the CIPAA is nothing but the by-product or the consequence of the substantive right created by the CIPAA. Thus, adopting the Court of Appeal's approach in the instant case on this point, it would be correct for this court to hold that ss. 28 to 30, being part of this regime are in actuality the extension of the substantive rights created by the CIPAA. Consequently, the CIPAA is not merely concerned with a change of forum. It cannot be denied that the

CIPAA impacts parties to a construction contract significantly. The entire basis has changed. The financial structures used previously and the entitlement to exercise the right of pay-when-paid contractual arrangement and cross-contract set-offs even though provided for in the construction contracts are now prohibited.

[37] Reliance by the appellant on *Westcourt Corporation* therefore is typically on the basis of faulty misunderstanding of the CIPAA and obvious failure to grasp the inevitable consequence on the parties' rights under a construction contract if the CIPAA is held to be a statute of general application.

[38] In further support of its conclusion that the CIPAA is to be applied retrospectively, the High Court in *UDA Holdings Bhd* also relied on the fact that the CIPAA being a legislation which encourages dispute to be resolved in a forum other than the court system must be construed as social legislation and the choice of an additional forum of resolution should surely be offered to all unless there is clear provision that it is not. Since there are no such provisions to allow for such an interpretation, the CIPAA is retrospective. The High Court in coming to the above finding relied on the decision of the Supreme Court of India in *New India Insurance Co Ltd v. Smt Shanti Misra* AIR 1976 SC 237. It is necessary to mention that this is also the position taken before us by learned counsel for the appellant when he contended that the CIPAA was enacted for the good and benefit of society. At para. [171], the High Court described the CIPAA in the following manner:

> [171] Even if this court is in error in considering CIPAA as procedural legislation, this court will nevertheless consider CIPAA as falling within the category of 'social legislation' as described by the Court of Appeal and affirmed by the Federal Court in *Westcourt Corp Sdn Bhd*. **While there is no definition of what exactly 'social legislation' is, it would be fair and reasonable to say that it would refer to legislation which is for the good and benefit of society**. (emphasis added)

[39] After giving much consideration to this finding, we take the view that learned counsel for the appellant is so caught up in his argument that the CIPAA merely involves the change of forum that he is unable to grasp the real purpose for which the CIPAA is enacted. There is absolutely no doubt that the application of the CIPAA is limited to construction contracts only. The main purpose underlying the enactment of the CIPAA is to ease cash flow problems in the construction industry. As noted in Hansard:

> Susulan daripada itu Rang Undang-Undang Pembayaran dan Adjudikasi Industri Pembinaan 2011 telah diwujudkan oleh Kementerian Kerja Raya selepas mengadakan beberapa siri perbincangan dan dialog bersama agensi pekerjaan, penggiat industri, pihak-pihak berkepentingan stakeholders dan badan professional yang berkaitan.

[40] In *Westcourt Corporation*, the Federal Court was concerned with the Tribunal for Homebuyer Claims. The amendments of the Housing Development (Control and Licensing) Act 1966 is intended to provide an avenue for homebuyers to bring claims of late delivery of homes. There is, therefore, a wider social element prevalent. The said piece of legislation is applicable to the wider public. On the contrary, the same cannot be said about the CIPAA. The Act was enacted following discussions between the key stakeholders within the construction industry. The CIPAA is limited and confined to the construction industry only hence, such limitation suggests the absence of wider social element. The CIPAA is not a piece of legislation for the good and benefit of society at large, it is only for the benefit of the construction industry. The plain truth is that the construction industry is just one segment of society. Therefore, we consider the submission of learned counsel on behalf of the appellant on this point as one which is imminently unpalatable.

[41] The High Court in *UDA Holdings Bhd* delved into the issue of substantive rights argument in deciding whether the CIPAA is retrospective or prospective. The High Court there approached the subject in its judgment by laying emphasis in paras. [133], [134] and [136] that the CIPAA is a legislation focused on payment procedure as opposed to substantive rights. It says:

> [133] Here, I am once again reminded of what May LJ said in *Pegram Shopfitters Ltd v. Tally Weijl (UK) Ltd* of how it is in the nature of construction contracts to 'generate disputes about payment'. Where there are 'delays, variations or other causes of additional expense, those who do the work often consider themselves entitled to additional payment. Those who have the work done often have reasons, good or bad, for saying that the additional payment is not due'. This diametrically opposing stance unfortunately does no one any good; including for instance the innocent purchaser of the property; or the owner of the property being developed. This impasse was recognised as stifling the lifeblood of the industry that policy intervention through legislation was seen fit. *CIPAA is intended to provide an intervening provisional decision or 'a temporary balance ... in appropriate circumstances ... in favour of those who claim payment, at the temporary expense if necessary of those who pay'. These adjudication decisions, 'being quick and dirty'*, also 'provide a quick enforceable interim decision under the rubric of 'pay now, argue later' are necessary so as to give 'life' back to the enterprise or underlying contract which had reached an impasse or stalemate. It is in the very nature of the scheme or mechanism that the substantive issues relating to the payment can still be argued at a later point; or taken concurrently at separate proceedings initiated in court or at arbitration.
>
> [134] *It is absolutely vital, if not imperative, that this ethos of adjudication focused on a payment procedure or mechanism is fully appreciated before one can address the issue of the operation and application of the Act*. Without this understanding or full appreciation of the intention of Parliament insofar as CIPAA is

A concerned runs the risk of giving the Act a sterile and literal interpretation. This, in turn, may undermine, frustrate or render futile to the extent of emasculating the efforts of Parliament in this regard.

...

B [136] *Seen in its proper perspective, it cannot be denied that adjudication is nothing more than a dispute resolution mechanism. It is a regime, process or procedure before which the parties, disputes or differences over payments claimed by one party against the other party will be determined by an adjudicator*. That adjudicator's decision (as opposed to an award or an order), though enforceable, is only provisional for the intervening period, commonly referred to as 'temporary finality' ... (emphasis added)

C

[42] It is necessary to stress that we have been very careful perusing through the judgment in *UDA Holdings Bhd*, but upon reading it one thing is very clear to us, that is that, the High Court, is of the view that adjectival or procedural law operates retrospectively, the change of forum is a change D of adjectival or procedural law and not a change of a substantive law and since the CIPAA is a procedural legislation, it is to be applied retrospectively. With respect, this is not an accurate legal position in this country neither is it a correct approach in construing whether an Act of Parliament is retrospective or prospective. It is important to highlight on this E aspect that whether a statute has a retrospective effect cannot in all cases safely be decided by classifying the statute as procedural or substantive.

[43] We consider that the correct and proper approach to the construction of a statute in order to determine whether a statute is retrospective in its effect is expounded by the Privy Council in its decision in *Yew Bon Tew & Anor* F at pp. 58, 59 & 62 (CLJ); p. 5 (MLJ) to the following effect:

Apart from the provisions of the Interpretation Statutes, there is at common law a *prima facie* rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is G retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being H prescribed.

But these expressions "retrospective" and "procedural", though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one aspect of a case (e.g. because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another aspect of the same case (e.g. because I it applies only to the post-statute commencement of proceedings to

enforce that cause of action); and **an Act which is procedural in one sense may in particular circumstances do far more that regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself**.

Whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the wording of the statute, having regard to the normal canons of construction and to the relevant provisions of any interpretation statute.

...

...

...

Their Lordships consider that the proper approach to the construction of the Act of 1974 is not to decide what label to apply to it, procedural or otherwise but to see **whether the statute, if applied retrospectively** to a particular type of case, **would impair existing rights and obligations**. (emphasis added)

[44] Likewise, the Court of Appeal in *Sim Seoh Beng @ Sim Sai Beng & Anor v. Koperasi Tunas Muda Sungai Ara Berhad* [1995] 1 CLJ 491; [1995] 1 MLJ 292 in the judgment of Gopal Sri Ram JCA (as His Lordship then was) reiterated a similar sentiment on this trite legal position when His Lordship, at pp. 495 & 496 (CLJ); pp. 296-297 (MLJ) expressed the following view:

The traditional approach to the interpretation of statutes (which includes subsidiary legislation such as the Rules of the High Court 1980) in this area is contained in the general rule that, *in the absence of express words or necessary implication, statutes affecting substantive rights are prospective while those affecting procedure are retrospective*.

...

...

...

The classification of a statute in general terms as procedural or substantive is singularly unhelpful; for a statute may at once be procedural for one purpose and substantive for another, depending upon the context in which it is being construed: *Maxwell v. Murphy* (1957) 96 CLR 261; *In the Estate of Fuld (No 3)*[1968] P 675 at p 695; [1965] 3 All ER 776 at 779; [1966] 2 WLR 717 at p 734 per Scarman J; *Re Dosabhai Ardeshir Cooper* (1950) 52 Bom LR 625. It calls for a construction of the statutory provision as a whole: *Ramanathan Chettiar v. Lakshamanan Chettiar* [1963] 1 Mad LJ 46 at p 50.

In our judgment, *the correct test to be applied to determine whether a written law is prospective or retrospective is to first ascertain whether it would affect substantive rights if applied retrospectively. If it would, then, prima facie that law must be construed as having prospective effect only, unless there is a clear indication in the enactment that it is in any event to have retrospectivity*. Contra, where the written law does not affect substantive rights.

(emphasis added)

[45] From the above authorities, it is clear to us that in the absence of express words to such effect, a statute, notwithstanding whether it is procedural or substantive, cannot be applied retrospectively to impair a substantive right. This settled legal position, we would say, accords well with and further amplifies those statutory provisions of the interpretation statute namely Act 388. To reiterate our point, it is important to note that the CIPAA in itself does not contain any provision stating that it has retrospective application. Parliament therefore clearly does not exercise its legislative power pursuant to art. 66 cl. (5) of the Federal Constitution and sub-ss. 2(3), 19(1) and 43(a) of Act 388 to enact the CIPAA with retrospective effect.

[46] That said, the undisputed facts cannot be ignored. The parties have agreed with the payment arrangement relating to the basis of pay-when-paid provision in the agreement. However, pursuant to s. 35 of the CIPAA which prohibits conditional payment, such provision is no longer allowed and as such, the appellant is now prohibited from relying on an express term of the construction contract relating to the conditional payment. Section 35 as it stands surely will have a significant impact on the pay-when-paid provisions in the construction contracts existing before the CIPAA was enacted. Thus, fully cognizant of the test in *Yew Bon Tew & Anor*, the question we need to ask is whether a retrospective application of the CIPAA (absent express words by Parliament to glean its legislative intention to that effect) would substantially affect or impair the rights of the parties to the construction contract. We have no difficulty whatsoever in holding that the answer should be in the affirmative and consequently the CIPAA should be prospective and not retrospective in its operation.

[47] The Court of Appeal in this case was called upon to decide whether the provision in s. 35 of the CIPAA applied to the construction contract with the result of avoiding a clause therein. We entirely agree with the judgment of the Court of Appeal from which we can clearly discern and accept the conclusion that:

(i) the applicability of s. 35 of the CIPAA depends on whether it was intended to have a retrospective operation. There is no express provision in the CIPAA excluding or including construction contracts made prior to the commencement of CIPAA, consequently, the CIPAA is prospective in nature;

(ii) unless there are clear words in the legislation to the contrary, any legislation affecting substantive rights must be given a prospective effect. If the legislation is procedural in nature, that legislation must be given retrospective legislation unless there are clear words in the same show to the contrary;

(iii) prior to the CIPAA, claimants in the construction industry could only resort to either the courts or arbitral tribunals to settle their disputes. Access to the courts and arbitral tribunals were the only legal rights available to the claimants to claim for their contractual fees. With the advent of claim for their contractual fees, the CIPAA has in effect created a new regime in which claimants in the building industry can claim their contractual fees;

(iv) access to justice is in anyone's view a substantive right. The CIPAA has created and given a new avenue of access to justice to claimants in the construction industry. Hence the CIPAA is in essence a legislation relating to a substantive right. Within the CIPAA, there also exists a procedural regime dictating as to how claims are to be processed before the adjudicator. The procedural regime is nothing but a by-product or the consequence of the substantive right created by the CIPAA;

(v) in the context of s. 35, it relates to a substantive right of an individual. That substantive right is nothing less than the right to freedom of contract where parties are entitled to regulate their business affairs subject of course to any prohibitions recognised by law. Section 35 in essence takes away the right of the parties to have their payment regime regulated by a "pay when paid" mode. Here, there is no dispute that prior to the adjudication process, the appellant only received payments when the respondent had been paid by ITD Vertex. Hence the contention by learned counsel for the appellant that it is totally unfair that the respondent can now rely on s. 35 of the CIPAA to void cl. 11 of the construction contract; and

(vi) there is also a presumption when interpreting statutes and that is that Parliament will not take away the entrenched right of individual retrospectively unless with clear words within the statute. There are no such clear words in the CIPAA. That being the case, there is no hesitation on our part to conclude that the CIPAA is prospective in nature. In so far as s. 35 is concerned, cl. 11 of the construction contract remains afoot and valid.

[48] The next point in the argument urged on behalf of the appellant is that the Federal Court in *View Esteem*, *supra*, in paras. [9] and [10] had considered and cited *UDA Holdings Bhd*. Whilst learned counsel for the appellant concedes that the Federal Court in *View Esteem* did not expressly approve the judgment of the High Court in *UDA Holdings Bhd*, he submits that it can be argued that the Federal Court had accepted the decision in *UDA Holdings Bhd* that the CIPAA applied retrospectively to both construction contracts and payment disputes. In our judgment, the Federal Court's decision in *View Esteem* cannot be read as an affirmation of the High Court's decision in *UDA Holdings Bhd*. Let us now turn to the relevant excerpts from the Federal Court's decision in *View Esteem* which referred to *UDA Holdings Bhd*:

A [9] The application of s. 41 of the CIPAA had been earlier considered and decided by the High Court in the case of *UDA Holdings Bhd v. Bisraya ConstrucTion Sdn Bhd & Anor And Another Case* [2015] 5 CLJ 527; [2015] 11 MLJ 499 which held that the CIPAA as a new act applied retrospectively. The High Court held that the CIPAA applies to construction contracts entered into before the coming into force of the CIPAA and also to
B payment disputes that arose before the enforcement of the CIPAA.

[10] It is significant to note that in the case of *UDA Holdings Bhd* the KLRCA as the body designated by the CIPAA as 'the adjudication authority' (see s. 32) had itself propounded that this new Act should apply only to payment disputes that arise after the CIPAA has come into force.
C The High Court in *UDA Holdings Bhd* held that CIPAA has a full retrospective effect to cover both construction contracts and payment disputes that arose before CIPAA came into force. In the result, it would appear that s. 41 of the CIPAA is not only a 'saving provision' but also a transitional provision as the CIPAA has been declared by case law to apply retrospectively to pre-existing payment disputes.

D

[49] The above excerpts relate to the Federal Court's decision in respect of questions 1 and 2 in *View Esteem* and these are:

(1) Whether a jurisdictional challenge as to the application of the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') can
E be made any time by way of an application or whether such an application can only be made upon the application to set aside an adjudication award under section 15 of the CIPAA;

(2) Whether section 41 of the CIPAA operates to exclude any proceedings from the operation of the CIPAA if the whole or any part of such a claim has been brought to court or arbitration prior to the coming into force of
F the CIPAA;

[50] It is apposite to note from the above passages that the Federal Court had merely mentioned *UDA Holdings Bhd* in passing. But the fact remains that the Federal Court did not decide on the correctness or otherwise of the decision in *UDA Holdings Bhd*. Leave questions 1 and 2 in *View Esteem* were
G not concerned with whether the CIPAA is retrospective or prospective in nature. It is concerned with the respondent's claim of which arbitration proceedings were commenced before the CIPAA came into operation. The Federal Court decided that s. 41 of the CIPAA as savings provision applied to exclude the respondent's claim as arbitration in respect of the same had
H been commenced before the CIPAA came into operation. Nowhere did the Federal Court decide that since court and arbitration proceedings relating to any payment disputes under a construction contract are saved by s. 41, it follows that the CIPAA applies to construction contracts entered into before the commencement of the CIPAA. Thus, the issue of whether the CIPAA
I was retrospective or prospective was not a live issue to be decided in *View Esteem*. Accordingly, it is simply incorrect to assert that the Federal Court in *View Esteem* affirmed the decision of the High Court in *UDA Holdings Bhd*.

[51] It does not escape our notice that the High Court in its decision in *UDA Holdings Bhd*, apart from arriving at the conclusion that the CIPAA amounted to procedural or social legislation, also relied on the general provision of s. 2 and the savings provisions found in ss. 3 and 41 of the CIPAA to arrive at the conclusion that the CIPAA had retrospective application. For the purpose of our deliberation on these provisions, it is necessary to set out the same in full:

> Application
>
> 2. This Act applies to every construction contract made in writing relating to construction work carried out wholly or partly within the territory of Malaysia including a construction contract entered into by the Government.
>
> Non-Application
>
> 3. This Act does not apply to a construction contract entered into by a natural person for any construction work in respect of any building which is less than four storeys high and which is wholly intended for his occupation.
>
> Savings
>
> 41. Nothing in this Act shall affect any proceedings relating to any payment dispute under a construction contract which had been commenced in any court or arbitration before the coming into operation of this Act.

[52] The High Court in *UDA Holdings Bhd* was of the view that construing ss. 2, 3 and 41 of the CIPAA together, Parliament had in fact expressed its intention on the issue of application and non-application of the CIPAA to construction contracts entered into before the enactment of the Act. This view is expressed in paras. [143] and [144] of the judgment wherein the conclusion reached is that the CIPAA "applies to all construction contracts made in writing regardless of when those contracts were made so long as those construction contracts are to be carried out wholly or partly within the territory of Malaysia". In paras. [146] and [147] of the grounds of judgment, the High Court arrived at the conclusion that the effect of s. 41 read together with ss. 2 and 3 of the CIPAA would mean that proceedings commenced before 15 April 2014 are expressly excluded or preserved from the effect of the new law. The relevant paragraphs of the decision are reproduced below:

> [146] The effect of s. 41 is to save or exclude those proceedings relating to any payment dispute under a construction contract which have already been commenced in any court or arbitration before 15 April 2014 from the operation or operative effect of the application provision in s. 2. Those proceedings are expressly excluded or preserved from the effect of the new law; and are expected to continue as if the Act never came into force for the related payment dispute ...

A [147] As a corollary, it may be said that if there was no savings provision inserted, there may just have been some room to begin an argument for an interpretation of prospective application of CIPAA. However, given that there is a clear specific savings provision in s. 41, that possible argument must now be put to rest.

B **[53]** It is also the appellant's case that ss. 2, 3, 40 and 41 support the proposition that the CIPAA applies retrospectively. According to learned counsel for the appellant, s. 3 excludes those construction contracts which were entered into by a natural person for any construction work in respect of any building which is less than four storeys high and which is intended C for his occupation. In addition, s. 40 empowers the Minister to exempt a person or class of person, or contract, matter or transaction from the operation of the CIPAA. Learned counsel then submits that looking at the CIPAA in its entirety, the only limiting provisions are the exclusion provision in s. 3, the exemption provision in s. 40 and the savings provision in s. 41. As regards s. 2, learned counsel for the appellant drew our attention D to the fact that the CIPAA applies to every construction contract made in writing relating to construction work carried out wholly or partly within the territory of Malaysia. Given the generality of the provisions in the said s. 2 as evident by the use of the word 'every' taken in conjunction with the legislative intent of the CIPAA to remedy the injustices of non-payment of E vulnerable subcontractors in the construction industry, the CIPAA, learned counsel submits, applies to all construction contracts notwithstanding whether it is made before or after its commencement.

[54] In our view, the savings provisions in s. 41 of the CIPAA does not and cannot amount to an express statement by Parliament for the CIPAA to apply F retrospectively. With due respect to learned counsel for the appellant, the interpretation ascribed to s. 41, as it is clear to us, is completely fallacious. On a plain reading of s. 41 of the CIPAA, there is no real doubt that all that is provided is that litigation and arbitration proceedings commenced prior to 15 April 2014 are not impacted by the introduction of the CIPAA. The G operation of s. 41 is only confined to and restricted by litigation and arbitration proceedings commenced prior to the commencement date of the CIPAA. It cannot be construed to mean, as the learned judge had done in *UDA Holdings Bhd*, that since construction contracts entered into before the commencement of the CIPAA are not included in ss. 3 and 41 and in view H of the generality of s. 2, it follows that the CIPAA applies to them. Such interpretation is, in our view, somewhat bizarre and bordering on absurdity.

[55] We need only say on this aspect that if the legislative intention is for the CIPAA to have a retrospective effect, Parliament would have included express provisions to that effect instead of providing for limiting provisions I in ss. 3, 40 and 41 and the general provision of s. 2 and leaving it to the court to imply or infer from these provisions that the CIPAA consequently applies

retrospectively to all construction contracts entered into before the CIPAA was enacted. Accordingly, we cannot accept the conclusion reached by the High Court in *UDA Holdings Bhd* and the submission of learned counsel for the appellant that the CIPAA, in view of ss. 2, 3, 40 and 41, operates retrospectively, as it was posited on the false premise that the generality of s. 2, the exclusion provision of s. 3, the exemption provision of s. 40 and the savings provisions in s. 41 as the only limiting provisions have put to rest the argument that the CIPAA is prospective in its operation. The plain facts is, there are no clear and express words in the CIPAA providing for its retrospective operation. This court must give effect to every word used in a statute and determine the meaning which emanates from it since there is a presumption that Parliament does not legislate and in fact does nothing in vain. As earlier stated, Parliament has fully appraised the existing problems experienced by the construction industry and is fully aware of the mischief the CIPAA seeks to overcome, yet it has elected not to include a clear and express provision that the CIPAA is to be applied retrospectively.

[56] We would also add that the High Court in *UDA Holdings Bhd* did not fully appreciate the impact on the parties when they have acted on their vested rights in the context of s. 41 of the CIPAA. The issue in these appeals concerns s. 35 of the CIPAA which takes away the rights of the respondent to utilise the pay-when-paid mode of payment under cl. 11.1 of the agreement. It would cause injustice and unfairness if the CIPAA and in particular ss. 5 and 35 thereof could be applied retrospectively when the parties had not only agreed to those terms as stipulated in cl. 13.1 of the agreement in *Ireka Engineering & Construction Sdn Bhd* or 11.1 of the agreement herein, but had during the course of the contract applied the same and had not disputed the application of this contractual provision.

[57] A consideration of the House of Lords decision in *Wilson v. First County Trust Ltd* [2003] 4 All ER 97 confirms the view that has been expressed above. At p. 142 of the grounds of judgment, Lord Scott made the following observation:

> [153] It is, of course, open to Parliament, if it chooses to do so, to enact legislation which alters the mutual rights and obligations of citizens arising out of events which predate the enactment. *But in general Parliament does not choose to do so for the reason that to legislate so as to alter the legal consequences of events that have already taken place is likely to produce unfair or unjust results. Unfairness or injustice may be produced if persons who have acquired rights in consequence of past events are deprived of those rights by subsequent legislation; or it may be produced if persons who have acquired rights in consequence of post events are deprived of those rights by subsequent legislation or it may be produced if persons … are subjected on account of those past events to liabilities that they were not previously subject to. There is, therefore, a common law presumption that a statute is not intended to have a retrospective effect*. This presumption is part of a broader presumption that Parliament does not intend a statute to have an unfair or unjust effect (see *Maxwell on Interpretation of Statutes* (12th edn,

A 1969) p 215 and *Bennion Statutory Interpretation* (4th edn, 2002) pp 265-266 and 689-690). The presumption can be rebutted if it sufficiently clearly appears that it was indeed the intention of Parliament to produce the result in question. The presumption is not more than a starting point. (emphasis added)

B **[58]** We accept that Parliament has the power to pass legislation to impair contractual rights. In fact, there are statutes which affect rights recognised in law which would have been in existence but for these statutes. In dealing with the issue of existing rights, *UDA Holdings Bhd* adopted the law as explained by Lord Rodgers in the House of Lords' decision of *Wilson v. First* C *County Trust*, *supra*, in coming to its decision on this issue. In his speech, Lord Rodgers at p. 15, referred to the speech made by Buckley LJ in the Court of Appeal decision of *West v. Gwynne* [1911] 2 Ch 1 in which he observed:

> But if at the date of the passing of the Act the event has not happened, D then the operation of the Act in forbidding the subsequent coming into existence of a debt is not a retrospective operation, but is an interference with existing rights in that it destroys A's right in any event to become a creditor of B. As a matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so to speak, a presumption that it speaks only as to the future. But there is no like E presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, do interfere with existing rights. To construe this section I have simply to read it, and, looking at the Act in which it is contained, to say what is its fair meaning.

The decision of the House of Lords in *Wilson v. First Country Trust* draws a F clear distinction between existing rights and vested rights. At p. 153 of Lord Rodgers's speech, the following was explained:

> The presumption is against legislation impairing rights that are described as 'vested'. The courts have tried, without conspicuous success to define what is meant by "vested rights" for this purpose. Although it concerned G a statutory rule resembling s. 16(1)(c) of the Interpretation Act 1978, the decision of the Privy Council in *Abbott v. Minister For Lands* [1895] AC 425 is often regarded as a starting-point for considering this point. There Lord Herschell LC indicated (at page 431), that, *to convert a mere right existing in the members of the community or any class of them into an accrued or vested right to which the presumption applies, the particular beneficiary of the right must have* H *done something to avail himself of it before the law is changed*.
>
> (emphasis added)

[59] It is apparent from the above passages that where the parties have acted on their contractual rights in respect of a particular clause of a construction contract, such as the pay-when-paid provision in the instant I appeals and the cross-contract set-offs clause in *Ireka Engineering & Construction Sdn Bhd*, ss. 35 and 5 of the CIPAA respectively should not have retrospective effect on the contract between the parties in order to interfere

with those contractual rights which have already been vested in and exercised by the respondent. We would go further to say that in such a situation any interpretation that the statute operates retrospectively would prejudicially affect vested rights or the legality of the past transaction which predates the legislation.

[60] Accordingly, once a party has acted on its contractual rights at a time when such contractual provisions were permissible, the presumption against retrospection is strong. In the case of *Mithilesh Kumari & Anor v. Prem Behari Khare* 1989 AIR 1247 the Indian Supreme Court was of the following view:

> We read in Maxwell that it is a fundamental rule of English Law that no statute shall be construed to have retrospective operation unless such a construction appears very clearly at the time of the Act, or arises by necessary and distinct implication. A retrospective operation is, therefore, not to be given to a statute so as to impair existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. Before applying a statute retrospectively. The court has to be satisfied that the statute is in fact retrospective. *The presumption against retrospective operation is strong in cases in which the statute, if operated retrospectively, would prejudicially affect vested rights or the illegality of the past transactions, or impair contracts, or impose new duty or attach new disability in respect of past transactions or consideration already passed.* (emphasis added)

[61] It is therefore clear that courts will be slow in concluding that a statute would have retrospective effect if such construction will consequently impact vested rights, contracts, transactions or impose new duties and obligations in relation to past transactions for to do so would be contrary to the presumption that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction. The basis of this presumption in this area of the law is no more than simple fairness, and justice which ought to be the basis of every general rule. It should be observed that this is another dimension or a broader presumption in the approach in determining whether legislation has retrospective application. It will be remembered that Lord Scott in *Wilson v. First Country* in para. [153] succinctly stated that "there is a common law presumption that a statute is not intended to have retrospective effect. This presumption is part of a broader presumption that Parliament does not intend a statute to have an unfair or unjust effect".

[62] In our judgment, the fact that Parliament does not expressly state that legislation will be prospective would be the starting point and thereafter other factors such as fairness and hardship will also be considered. Apart from *Wilson v. First Country*, we would also refer to the English Court of Appeal's decision in *Secretary of State For Social Security And Another v. Tunnicliffe* [1991] 2 All ER 712 wherein Staughten LJ on the issue of fairness said:

> In my judgment the true principle is that **Parliament is presumed not to have intended to alter the law applicable to past events and transaction in a manner which is unfair to those concerned in them**, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree - the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended. (emphasis added)

(see also *L'Office Cherifien des Phosphates And Another v. Yamashita-Shinnihon Steamship Co Ltd (The Boucraa)* [1994] 1 All ER 20 at p. 30). We would add that it is also manifestly unjust if the effect of a statute is to deprive a person such as the respondent herein of a defence or remedy available to him before the commencement of the statute (*Yew Bon Tew & Anor*, *supra*).

[63] A perusal of the appeal record manifestly shows that the agreement was made before the CIPAA was enacted which conferred existing right to the parties to rely on cl. 11.1 thereof in which both the appellant and the respondent have agreed that all payments to the appellant shall be made by the respondent within seven days from the date the respondent received related progress payment from their employer. To our minds, this clause beyond question does not impose an obligation on the respondent to make payment to the appellant until and unless the respondent has received payment from the employer for the related progress payment. Thus, any payment dispute giving rise to a claim entitles the respondent to rely on this clause. At the time of entering into this agreement, clauses in the nature of cl. 11.1 of the agreement set out above have been recognised and accepted to be valid. The courts have accepted that parties may arrange their financial affairs such that payment to a subcontractor will only be effected upon receipt of payment by the main contractor from the employer. The Federal Court in *Globe Engineering Sdn Bhd v. Bina Jati Sdn Bhd* [2014] 7 CLJ 1; [2014] 5 MLJ 145 addressed and discussed the ambit of pay-when-paid clauses and held at pp. 146 and 164 that where "it is clear and unambiguous that the pay-when-paid clause is in fact a pay-if-paid clause, then pay-when-paid clause is enforceable as a pay-if-paid clause". Similarly, the Court of Appeal in *Antah Schindler Sdn Bhd v. Ssangyong Engineering & Construction Co Ltd* [2008] 3 CLJ 641; [2008] 3 MLJ 204 in paras. [15] and [16] recognised the pay-when-paid provisions as a right and such right of the plaintiff to pursue its claim against the defendant in that format could not be denied since it was unambiguously expressed in the main contract. Thus, there is no doubt that the courts recognised the rights of parties to include pay-when-paid provisions in their contracts the effectiveness and application of which will depend on the language of such clauses.

[64] The appellant has never disputed nor challenged the language or the manner in which the said pay-when-paid clause is to operate. Throughout the course of the works, the respondent between March 2011 until August 2011 has always paid the appellant its related progress payment only upon

receiving the corresponding payment from the employer. However, in the subsequent events that happened, the employer had defaulted in payment of certified amounts and the respondent was consequently unable to pay the related progress payments to the appellant.

[65] Relying on cl. 11.1 of the agreement, the respondent informed the appellant as early as 18 May 2012 that it was still awaiting payment of the certified amounts from the employer. However, on 21 November 2012 the employer was wound up pursuant to the order of the court dated 21 November 2012 *vide* Companies Winding Up Petition No: 29NCC-791-09-2012 of which the appellant was informed by the respondent on 12 December 2012. The respondent also further informed the appellant that they would be taking the necessary steps to recover the sums owed by the employer.

[66] On 21 May 2013, the appellant enquired from the respondent, as to the status of the matter with the employer. There is no doubt that the appellant was willing to wait for the respondent to recover the sums that was due and owing from the employer for claims number 6, 7 and 8. Thus, the appellant was prepared to abide by the terms of cl. 11.1 of the agreement.

[67] On 12 September 2013, the respondent informed the appellant that it has filed its proof of debt in May 2013 and the amounts submitted in the proof of debt included the certified and uncertified amount which were due to both the appellant and the respondent from the employer. The appellant did not at any point prior to the coming into force of the CIPAA make a claim either in arbitration or in court to recover the monies. They had instead acquiesced to the terms of pay-when-paid arrangement as stipulated in the agreement. From the undisputed facts, it is clear that the appellant had accepted that pursuant to cl. 11.1 of the subcontract, the appellant did not have a basis to commence legal proceedings against the respondent as the employer had not paid the respondent. The appellant ought not to have resiled from the agreement by taking contrary position that cl. 11.1 is inapplicable or unenforceable.

[68] However, it seems to us that after the decision of *UDA Holdings Bhd* which held that the CIPAA had retrospective application to all construction contracts and all construction disputes the appellant commenced adjudication proceedings against the respondent. At para. 71 of the adjudication decision the adjudicator held as follows:

> I therefore hold that Section 35 of the CIPAA applies retrospectively and that Section 11 of the said Subcontract is void. To this extent, the respondent's contention is dismissed.

[69] Clearly, the dispute arose before the commencement of the CIPAA which entitled the respondent to rely on the right vested in them pursuant to cl. 11.1 of the agreement. In our judgment, once parties have acted upon their contractual rights and taken steps in that regard, this means that the

parties have exercised their contractual rights. It would be grossly unfair to the respondent if the CIPAA is construed to apply retrospectively. In our view, it is unlikely that Parliament could have intended that the CIPAA is to be applied this way. The law expects that Parliament will make it clear if that is intended. Precisely, it cannot be and should not be the case that the CIPAA ought to operate retrospectively which consequently after the act has taken place will render such act void and the right extinguished.

[70] Given that the CIPAA impacts parties' substantive rights, a retrospective application of the CIPAA would have the effect of interfering with the basic principle of freedom of contract. Accordingly, the bargain entered into by the parties as manifested in cl. 11.1 of the agreement should not be ceded to s. 35 of the CIPAA. There is no such clear and express provision in the CIPAA by which it could have been ordained that the appellant's stance that the CIPAA operates retrospectively should receive favourable consideration from us. We agree with the submission of learned counsel for the respondent that ss. 5, 28, 29, 30, 35, 36 and 37 impact parties' substantive rights and for this reason it cannot be said that the CIPAA is only limited to procedural or social matters. For the reasons that we have given, we would hold that a holistic interpretation and construction ought to be given and since there are various provisions in the CIPAA that impact parties' substantial rights, it must be that the CIPAA in its entirety should have prospective application only. It cannot be the case that some parts of the CIPAA have retrospective application whereas the other parts are held to have prospective application.

[71] The last remaining point concerns the appellant's argument that a construction that will promote the purpose underlying the CIPAA shall be preferred to justify the retrospective application of the CIPAA. The principle of purposive interpretation of statute is provided in s. 17A of Act 388. The High Court in *UDA Holdings Bhd* at paras. [220] to [225] relied on s. 17A of Act 388 and referred to the Federal Court case of *Andrew Lee Siew Ling v. United Overseas Bank (Malaysia) Bhd* [2013] 1 CLJ 24; [2013] 1 MLJ 449 to advance the argument that the CIPAA is retrospective in its operation. There is no doubt that the object and purpose of the CIPAA is expressly stated in the long title thereof. However, such purposive approach in our judgment in no way diminishes the trite general presumption of prospectivity of a statute. It ought to be emphasised that the only issue in this case is whether the CIPAA is to have a retrospective application. Therefore, s. 17A of Act 388 must be read subject to the said general presumption and ss. 19(1) and 43 of Act 388 which require clear and express intention to apply the CIPAA retrospectively. In any event, we would say that it is incorrect for the purposive approach to be applied in this case as the underlying purpose of the CIPAA, as correctly found by the High Court in *UDA Holdings Bhd*, is sufficiently plain, unambiguous, and not disputed in these appeals. The duty of the court, and its only duty, is to expound the language of the Act in

accordance with the settled rules of construction. The duty of the court is limited to the words used by the Legislature and to give effect to the words used by it (see *Vacher & Sons Ltd v. London Society of Compositors* [1913] AC 117-18; *Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor* [2007] 5 CLJ 673; [2007] 2 MLRA 187]. Regard to the purpose of an Act of Parliament under s. 17A of Act 388 shall only be had when the meaning of a statutory provision is not plain (*Andrew Lee Siew Ling*, *supra*). We would in this regard, reiterate our finding that there is no clear and express provision that the CIPAA operates retrospectively. The appellant's argument on this point is obviously otiose and untenable.

Conclusion

[72] We see no reason, in the lights of our deliberation above, to be persuaded by the appellant's argument that the CIPAA is a legislation of general application. The provisions of the CIPAA undoubtedly affect the substantive rights of parties and such rights ought not to be violated as it is of fundamental importance to the respondent besides being an essential component of the rule of law. Consequently, the entire Act ought to be applied prospectively. In our judgment, any interpretation that the CIPAA takes effect retrospectively inhibits the exercise of the respondent's vested right in accordance with the bargain entered into between the parties. The outcome, as earlier indicated, is that both questions of law allowed by this court at the leave stage must be answered in the negative. In the upshot, the entire adjudication proceedings including the adjudication decision are rendered void. The glaring conclusion which emerges is that the appellant is unsuccessful in all of their contentions. Absent any express intention by Parliament that the CIPAA is to be applied retrospectively, the CIPAA can only be applied prospectively. The adjudication decision therefore ought to be set aside. Accompanying this conclusion is our unanimous decision that both appeals are dismissed with costs and the decisions of the Court of Appeal are affirmed.